

2007 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION NEGOTIATION COMPETITION FACT PATTERN

On the sun-drenched, golden-brown hillsides outside of San Bernardino in San Gabriel County, thousands of small wind turbines spin intermittently in harmony with the Southern California breezes. The turbines -- originally installed in the 1980s with 20-year operating permits - also kill thousands of birds. According to a 2004 California Energy Commission report, the 6200 turbines located in the Diego Flores Wind Resource Area kill up to 5100 birds a year, including 1600 raptors (eagles, hawks, falcons) and 550 owls, leading some bird advocates to refer to the turbines as “cuisinarts.” Last year, the County renewed the operating permits, adding some new conditions for protection of avian species, but without providing any environmental documentation, relying on a “categorical exemption” under the California Environmental Quality Act (“CEQA”), Pub. Resources Code §§ 21000, et seq.

The turbines of the Diego Flores Wind Resource Area were among the first installed anywhere in the world. They were originally owned and operated by small, often idealistic entities seeking to change the country’s energy footprint and its reliance on energy from fossil fuel. Over time, however, those entities failed, either declaring bankruptcy or selling their assets cheaply. Quietly, UberPower, headquartered in Kentucky and one of the largest power companies in the world, purchased almost all of the original turbines and their operating rights. Unlike the original entities, UberPower has no particular interest in promoting wind power as an environmentally-friendly renewable energy source alternative to coal, gas, and petroleum. Rather, UberPower believes that in the current marketplace wind power can be competitive with carbon-based sources, and that the Wind Resource Area operation will provide a strong return on investment. UberPower’s 37-year-old CEO Talia Mermin has a business degree from Wharton, a reputation for hard-nosed business practices, and substantial political clout as one of the few female CEOs of a Fortune 500 company.

As part of the permit renewals, UberPower agreed to shut down 200 turbines that have been identified by biologists studying the area as particularly likely to kill birds. In addition, the company agreed to “repower” the entire Resource Area, replacing the 6200 original turbines with 1600 substantially larger and more efficient units, which will generate the same amount of power. Repowering, according to permit requirements is to take place over 17 years. UberPower has indicated that it will also consider the opinions of scientists in siting the new units so as to reduce the potential for bird impacts. Each repowered unit will cost over \$1 million to purchase and install.

The San Gabriel chapter of Birds Eye View (“BEV”), a venerable national organization of birders and conservationists, sued UberPower, alleging violations of a dozen laws protecting birds and precluding “take” or killing without a permit, including, the Migratory Bird Treaty Act, 16 U.S.C. § 703, the Bald Eagle and Golden Eagle Protection Act, 16 U.S.C. § 668, Cal. Fish and Game Code §§ 2000, 3503.5, 3511, 3513, 3800, and 12000, and Cal. Penal Code § 597. The local chapter, led by Lucas Jefferson, believes that if the bird deaths cannot be reduced to nearly zero, the entire Wind Resource Area should be shut down. The national leadership at BEV has tried to moderate the

tone of the local chapter, concerned that it will be perceived as anti-alternative energy--not an acceptable posture with the world facing the threat of global warming from over-reliance on carbon fuel sources. The national organization, however, does not dictate policy to its local chapters, and Jefferson has remained steadfast.

Meanwhile, a local environmental group, Zeal Against Pollution ("ZAP"), filed a second law suit, this one against both San Gabriel County and UberPower (as real party in interest), for violations of CEQA. Lucas Jefferson and BEV believe that the suit undermines their action because winning the CEQA suit would result only in an environmental impact report, not the shut down of the old wind turbines. Jefferson expressed his view to ZAP president Alix D'Agastino, in less than diplomatic terms, and the two have not spoken since. As a result, the environmental groups are not coordinating on litigation strategy or in negotiations.

BEV Legal Claims. BEV alleges violations of Business and Professions Code §§ 17200 et seq. for unlawful business practices. B&P 17200 actions usually involve "predicate acts," i.e., violations of other laws, which form the basis of the B&P 17200 violations. *See, e.g., Pines v. Tomson*, 160 Cal.App.3d 370 (1984). As noted above, BEV alleges a series of predicate acts, all related to the take or kill of protected birds. For example, Fish & Game Code § 2000 provides that "it is unlawful to take any bird, mammal, fish, reptile or amphibian . . .," (with certain exceptions). Fish & Game Code § 3503.5 makes it "unlawful to take, possess, or destroy any birds in the orders Falconiformes [i.e., eagles, hawks, and falcons] or Strigiformes [i.e., owls] (birds of prey)" Fish & Game Code § 3511 designates Golden Eagles as "fully protected," without exception, subject to criminal enforcement. In addition, Fish & Game Code § 3513 incorporates protections of the federal Migratory Bird Treaty Act (covering eagles, hawks, falcons, owls). The federal Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 precludes killing of golden eagles. Finally, the California Penal Code § 597 prohibits causing any animal from being mutilated or cruelly killed.

Based on B&P 17200 and the bird protection statutes, BEV alleges that UberPower has engaged in unfair business practices resulting in the death of thousands of protected eagles, hawks, falcons, and owls in violation of the law. BEV seeks an injunction against the killing as well as restitution.

UberPower Response. Before November 3, 2004, "any person acting for the interest of itself, its members or the general public," could file an action under B&P section 17204. That changed when voters passed Proposition 64. Under the current law, plaintiffs must establish that they have "suffered injury in fact and ha[ve] lost money or property as a result of unfair competition." Business & Professions Code § 17204 (Nov. 3, 2004). *See Californians for Disability Rights v. Mervyn's*, 39 Cal.4th 223 (2006). In addition, any person may pursue representative claims for injunctive relief, but only if they meet the standing requirements of section 17204. Business and Professions Code § 17203 (Nov. 3, 2004). UberPower believes that it has a good chance of having the case dismissed because BEV cannot establish the requisite loss of money or property. The issue revolves around the definition of property, and UberPower believes that case law establishes that natural resources, including birds, are owned by the State on behalf of the

public, not by individuals or environmental groups. *See Selma Pressure Treating Co. v. Osmose Wood Preserving Co.*, 221 Cal.App.3d 1601 (1990); *People v. Glenn-Colusa Irr. Dist.*, 127 Cal.App. 30 (1932). UberPower recognizes the risk in relying on this legal position. If it is wrong, and BEV can pursue the case, it may face an injunction halting its entire wind turbine operation.

As a result, UberPower makes an additional argument: if maintaining any activity that results in the killing of any eagle, hawk, falcon, or owl is illegal, then many buildings must be torn down. UberPower contends that raptors die regularly in large cities by flying into buildings, and that operation of wind turbines is no different. Death by turbine may be messier, but it is no different to the bird than death by building. It is part of the natural course of existence for raptors in the modern world. The turbines, like the buildings, are stationary structures performing functions. The bird deaths are unfortunate, but are not “takes” or killing as contemplated by the various statutes.

ZAP Legal Claims. San Gabriel County issued new permits to UberPower for continued operation of the existing units and repowering (by replacement of the old turbines with a smaller number of larger turbines) over 17 years. The County determined that the CEQA categorical exemptions for existing facilities and for replacement or reconstruction applied, and that no environmental documentation was required. 14 Cal. Code Reg. §§ 15301, 15302; *see* Pub. Res. Code § 21084. ZAP contends that the exemptions do not apply, first, because repowering represents change different than and of a far greater magnitude than those actions contemplated by the exemptions, and, second, because there is a “reasonable possibility” that the activity will have a significant environmental effect due to “unusual circumstances.” 14 Cal. Code Reg. 15300.2(c). *See Wildlife Alive v. Chickering*, 18 C.3d 190, 204 (1976); *Meridian Ocean Sys. v. State Lands Comm’n*, 222 Cal.App.3d 153, 164 (1990). In ZAP’s view, the fact that the turbines are killing thousands of birds -- including many species afforded stringent statutory protection -- creates a very strong case for finding “unusual circumstances,” and requiring the completion of an environmental impact report before permit renewal approval.

ZAP also contends that the County has a duty under the common law concept of the Public Trust Doctrine to protect wildlife. *See* Fish & Game Code § 711.7(a); *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983). The County’s approval of this Permit, in ZAP’s view violates that public trust obligation.

UberPower Response. CEQA requires action by the County, but UberPower recognizes that the real issue is the continued operation of its wind turbine facilities. UberPower points out that the existence of “unusual circumstances” outweighing a categorical exemption is an issue of fact. *See Bloom v. McGurk*, 26 Cal.App.4th 1307 1316 (1994), and, unlike a threshold determination for drafting an EIR in the absence of a categorical exemption, here the burden of establishing the necessary facts falls on the plaintiff. *See City of Pasadena v. State*, 14 Cal.App.4th 810, 824 (1993). UberPower believes that the newly permitted uses are consistent with existing uses and that any changes from existing uses provided in the Permit are environmentally beneficial and reasonable. The company and its CEO recognize that, in light of the number of birds killed and the resulting

adverse publicity surrounding the site, it has a somewhat difficult case to win, whatever the strength of its legal positions.

With respect to the Public Trust Doctrine, UberPower contends that no court has ever extended the doctrine to resources beyond water, let alone to migratory birds that simply alight in California during long journeys. They also point to *National Audubon*, supra. UberPower believes that the Public Trust claim is simply a make-weight argument for ZAP.

Lucas Jefferson and Alix D'Agastino no longer speak to each other, and they refuse to negotiate jointly with UberPower. Normally, UberPower would insist that the groups discuss any settlement proposal jointly, but Mermin faces bank financing deadlines for new turbines and wishes to resolve the outstanding litigation. She also sees some potential to exploit differences in the positions of the competing groups. The stakes are high for all involved. Mermin needs the bank financing at the Diego Flores site in order to expand the growing wind business. Jefferson has ruffled feathers (so to speak) at the national BEV, which, while keeping hands off for now, has made it clear to Jefferson that he needs to get things resolved. And D'Agastino is running out of money, leaving the ZAP lawsuit in jeopardy. UberPower has agreed to two rounds of negotiations, first with ZAP (Round 1) and then with BEV (Round 2).¹

Round 1 (UberPower/ZAP)

ZAP's CEQA lawsuit is primarily procedural in nature, and D'Agastino has focused her demands for settlement on issues related to obtaining the best information regarding the operations and environmental impacts on birds at the site and in assuring those operations provide a better situation for the birds in the future. The suit is not intended to close down the operations. D'Agastino and ZAP have stated publicly their concerns about global warming, and support development of wind power where there is sufficient protection for birds. Preliminary discussions have narrowed the issues.

1. EIR

UberPower is willing to agree to and fund an EIR (and the County will do one if UberPower agrees). UberPower wants to wait three years to complete the EIR, stating that more data are needed from on-going studies before the EIR can be completed. ZAP insists that the EIR is already overdue, and delaying completion of the EIR, even for a short time, can only occur if

¹BEV's and ZAP's interests are not necessarily aligned on all issues. It is therefore certain that the BEV and ZAP would have different counsel in this matter. For purposes of this exercise, however, counsel will represent the ZAP in the first round and BEV in the second round, without reference to any ethical dilemmas.

- a. All old turbines are shut down every winter;
- b. The 1000 most dangerous turbines are shut down forever;
- c. The “repowering” program is completed more quickly.

2. Nature and Scope of Future Studies

ZAP and UberPower agree that additional studies are needed to identify effective methods to address impacts on birds. ZAP wants substantial specificity with respect to the studies’

- a. Timing
- b. Methodology
- c. Identity of Consultant

UberPower insists on a limit on costs.

3. Future Mitigation

ZAP understands, grudgingly, that reducing bird kills to zero is very unlikely without shutting down the operation. It insists, therefore, that some sort of mitigation is needed. UberPower has cleverly proposed that ratepayers should be charged one cent per megawatt generated at the Diego Flores site (about \$16 million per year) to pay for mitigation projects (such as enhanced raptor habitat). Given regulatory requirements mandating use of alternative energy sources, the mitigation cost would effectively be passed on as a “tax” to energy consumers. ZAP opposes a ratepayer fee, and believes that UberPower should pay for mitigation from its revenue.

- a. Amount
- b. How spent
- c. Who pays

ZAP will make an opening offer.

Round 2 (UberPower/BEV) (Assume that negotiations with ZAP are on-going)

Jefferson has made no secret of his belief that the Diego Flores Wind Resources Area is the wrong location for wind turbines. He wants substantial restrictions on operation of the turbines to minimize future bird mortality, and significant mitigation for past bird kills. UberPower has pursued an effective campaign in the press, painting Jefferson as unreasonable, and someone willing to ignore the threat of global warming. UberPower and BEV are wary of each other, but each would benefit from a deal.

1. Old Turbines

Jefferson and BEV seek major changes in operation of the old turbines:

- a. Winter shutdown;
- b. Complete shutdown of all of the original turbines within 6 years, with some shutdown beginning immediately;
- c. The schedule for the shutdown of original units is not tied to the schedule for commencing operation of repowered units;

UberPower can repower in less than 17 years, but it believes that for economic reasons shutdowns must be tied to repowering.

2. Baseline/Reduction

Jefferson and BEV want to tie overall site repowering to the effectiveness of any initial repowering to reduce bird kills. They wish to phase in some repowered units and monitor them. To do so, the parties have to agree on the baseline (the existing number of kills), which is subject to dispute, and the reduction from that baseline that would be acceptable. The parties are focused on owls, with an estimated kill of 300 to 550 per year.

- a. Decide on baseline owl kill;
- b. Decide on percentage reduction required to proceed to further repowering;
- c. Decide on consequences, if there is a failure to meet reduction requirement

3. Past Harm

This issue is about money: How much does UberPower need to pay to address past bird kills. The parties agree on the use of the funds. The money will be used by the Department of Fish and Game to improve raptor habitat in the area. The issue in dispute is the amount. BEV seeks \$50 million. UberPower has indicated that amount is untenable.

4. Adaptive Management

UberPower recognizes that if it cannot reduce bird kills by repowering alone, it will need to take certain adaptive management actions (such as painting the blades or moving or shutting down some turbines). UberPower, however, has some concerns about the costs associated with at least one adaptive management option and wants to discuss the timing of implementation of certain actions.

UberPower will make an opening offer.